



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted three recommendations at its hybrid (virtual and in-person) Seventy-seventh Plenary Session: (a) Contractors in Rulemaking, (b) Improving Notice of Regulatory Changes, and (c) Automated Legal Guidance at Federal Agencies.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2022-1, Kazia Nowacki; for Recommendation 2022-2, Matthew A. Gluth; and for Recommendation 2022-3, Alexandra F. Sybo. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov.

The Assembly of the Conference met during its Seventy-seventh Plenary Session on June 16, 2022, to consider three proposed recommendations and conduct other business. All three recommendations were adopted.

Recommendation 2022-1, *Contractors in Rulemaking*. This recommendation identifies best practices for managing contractors that assist agencies in the rulemaking process. It

recommends that agencies exercise proper oversight to avoid contracting out inherently governmental functions or other activities that should be performed by federal employees, clearly delineate responsibility between contractors and agency staff, institute safeguards to prevent or remediate conflicts of interest, and ensure transparency in connection with their contracting activities.

Recommendation 2022-2, *Improving Notice of Regulatory Changes*. This recommendation offers best practices for agencies to ensure that members of the public receive effective notice of regulatory changes, focusing especially on the needs of parties with limited resources to monitor agency actions. It recommends that agencies consider a variety of possible strategies for improving notice of regulatory changes, including providing updates on agency websites, allowing the public to sign up for electronic notifications, announcing updates via email distribution lists, and coordinating with organizations that can provide updates to their members.

Recommendation 2022-3, *Automated Legal Guidance at Federal Agencies*. This recommendation identifies best practices for agencies to use when designing and updating automated tools, such as interactive chatbots and virtual assistants, to provide legal guidance to the public. It addresses factors agencies should consider in deciding whether to utilize automated legal guidance tools, how agencies that utilize those tools can ensure that the information they provide is accurate and current, and how agencies can ensure that recipients of such guidance understand its limitations and do not rely on it to their detriment.

The Conference based its recommendations on research reports and prior history that are posted at: <https://www.acus.gov/meetings-and-events/plenary-meeting/77th-plenary-session>.

Authority: 5 U.S.C. 595.

Dated: June 28, 2022.

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2022-1

Contractors in Rulemaking

Adopted June 16, 2022

Agencies rely on private contractors to perform many kinds of services in support of their rulemaking activities. These services can occur at any stage of the rulemaking process. Functions that agencies assign to contractors include conducting research undergirding a rule; preparing regulatory impact analyses; facilitating meetings with interested persons; and tabulating, categorizing, or summarizing public comments the agency receives. As with other agency functions, contracting out specific rulemaking functions may help increase staffing flexibility to ease workloads, lower administrative costs, provide topic-specific expertise or access to technology that agencies do not possess internally, and provide alternative perspectives on particular issues.¹

Agencies' use of contractors, however, may also raise distinctive concerns in the rulemaking context.² Agencies must ensure that they comply with applicable legal obligations and must exercise their discretion in a way that avoids ethics violations, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors.

Among the applicable legal obligations is the prohibition on contracting out "inherently governmental functions."³ Inherently governmental functions are those that are "so intimately

¹ See Bridget C.E. Dooling & Rachel Augustine Potter, *Contractors in Rulemaking* (May 9, 2022) (report to the Admin. Conf. of the U.S.).

² Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28,364, 28,365 (July 12, 1985).

³ See 48 C.F.R. § 7.503; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56,227 (Oct. 12, 2011) [hereinafter OFPP Policy Letter]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76, *PERFORMANCE OF COMMERCIAL ACTIVITIES* (REVISED 2003). The prohibition is reflected in the Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) [hereinafter FAIR Act], and the National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411-12 (2008).

related to the public interest as to require performance by Federal Government employees.”⁴

They include “functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government”⁵

Whereas “determining” the content of a regulation is an inherently governmental function,⁶ providing “[s]ervices that involve or relate to the development of regulations” is not.⁷ Rather, the provision of such services is considered to be “closely associated with the performance of inherently governmental functions.”⁸ When agencies allow contractors to perform functions closely associated with inherently governmental functions, they must exercise heightened caution.⁹ They must, in particular, “give special consideration to Federal employee performance of [such] functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors’ activities to ensure that contractors’ duties do not expand to include performance of inherently government functions.”¹⁰

Agencies must also consider potential ethical issues when contracting out rulemaking functions. Because contractors are, with a few exceptions, generally not subject to the ethics laws governing federal employees, there are potential ethics-related risks against which agencies must protect and which may not be addressed adequately under existing procurement regulations.¹¹ The risks of conflicts of interest (both organizational and personal) and misuse of confidential information may be especially salient when contractors support a policymaking function such as

⁴ OFPP Policy Letter, *supra* note 3, § 3, at 56,236; *accord* FAIR Act, *supra* note 3, § 5, at 2384.

⁵ OFPP Policy Letter, *supra* note 3, § 3(a), at 56,236; *accord* FAIR Act, *supra* note 3, § 5(2)(B), at 2385.

⁶ 48 C.F.R. § 7.503(c)(5); *accord* OFPP Policy Letter, *supra* note 3, app. A, ex. 7, at 56,240.

⁷ 48 C.F.R. § 7.503(d)(4); *accord* OFPP Policy Letter, *supra* note 3, app. B, ex. 1(d), at 56,241.

⁸ OFPP Policy Letter, *supra* note 3, app. B, at 56,241; *accord* 48 C.F.R. § 7.503(d).

⁹ *See* OFPP Policy Letter, *supra* note 3, § 4(a)(2), at 56,236.

¹⁰ *Id.*

¹¹ *See, e.g.*, 48 C.F.R. subparts 3.11 (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions), 9.5 (Organizational and Consultant Conflicts of Interest).

rulemaking.¹² Agencies can mitigate these risks by establishing and internally disseminating policies and procedures governing the use and management of contractors in rulemaking, which may include any requirement that the agency disclose its use of contractors.

In addition to legal and ethical issues, agencies must also consider the potential negative consequences of using contractors to perform rulemaking-related functions, including whether repeated reliance on contractors might compromise their ability to maintain necessary career staff with appropriate skills. Agencies may also wish to consider alternative methods to contracting when they need to expand internal capacity in connection with rulemaking, such as using executive branch rotations, fellowship programs, or federally funded research and development centers, or by assigning temporary employees under the Intergovernmental Personnel Act.¹³

This Recommendation provides guidance to agencies for when they are considering contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary enormously, it addresses a range of legal, ethical, prudential, and practical considerations that agencies should take into account when using contractors.

RECOMMENDATION

Internal Management

1. Agencies that use contractors to perform rulemaking-related functions should adopt and publish written policies related to their use. These policies should cover matters such as:
 - a. The types of rulemaking functions considered to be inherently governmental functions or closely associated with inherently governmental functions;
 - b. Internal procedures to ensure that agency employees do not contract out inherently governmental functions and to ensure increased scrutiny when

¹² See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

¹³ See 5 U.S.C. §§ 3371–75; see also 5 C.F.R. part 334.

contracting out functions that are closely associated with inherently governmental functions;

- c. Requirements for internal disclosure of the functions contractors undertake with regard to specific rulemakings;
 - d. Standards for when contractors should identify themselves as such in communications with the public in connection with rulemakings; and
 - e. Ethical rules applicable to contractors, including their employees.
2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for employees on agency policies and ethical restrictions applicable to contractors. Agencies should also consider designating an agency office or officer to answer questions about the use of contractors to perform rulemaking-related functions and be responsible for deciding whether a function is inherently governmental.
3. When agencies rely on contractors in a rulemaking, they should ensure that agency employees can identify contractors and are aware of contractors' assigned functions. Agencies should specifically focus on whether contractors should work in the same space as agency employees, how and to what extent they may participate in meetings with agency leadership or other meetings at which substantive policy is decided, and whether they should be provided with their own agency email addresses.
4. Agencies should consider ways to share information about contractors in rulemaking within and across agencies. This might include using existing contracting databases or schedules to promote greater coordination and efficiency concerning existing contracts for rulemaking-related functions, as well as informal sharing of practices for managing contractors.

Ethics

5. When selecting and managing contractors for rulemaking-related functions, agencies should evaluate whether any firm under consideration to serve as a contractor may have

an actual or perceived organizational conflict of interest in connection with any assigned function. When a potential organizational conflict exists or arises, agencies should either select another contractor or put in place appropriate protections to ensure that the contractor's outside interests do not undermine its ability to perform its assigned functions in a way that does not create an actual or perceived conflict of interest.

6. When contracting out rulemaking-related functions for which there is a risk of a personal conflict of interest by an employee of the contractor, agencies should provide in the contract that the contractor will not assign functions to any employee who has an actual or perceived conflict of interest and, as appropriate, will train employees on recognizing and disclosing personal conflicts. The contract should also provide that, in the event that an employee performs a function despite the existence of a personal conflict of interest, the contractor will disclose the conflict to the agency and undertake appropriate remedial action.
7. When contracting out rulemaking-related functions for which there is a risk of misuse of confidential information, agencies should provide in the contract that the contractor will ensure that any employee handling such information has been appropriately trained on the necessary safeguards. The contract should also provide that the contractor will disclose any misuse of confidential information to the agency and undertake appropriate remedial actions.

Transparency

8. When an agency uses a contractor to perform an activity closely associated with an inherently governmental function in a specific rulemaking, the agency should disclose the contractor's role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to the final rule. Agencies should, unless legally precluded from doing so, also disclose the identity of the contractor.

9. Agencies should ensure that their contracts with contractors will allow the agencies to meet legal requirements for disclosure of information in connection with the rulemaking process and judicial review.

Intergovernmental Guidance

10. The Office of Management and Budget should consider assessing whether current agency practices align with broader procurement best practices and whether to provide guidance on contractor-performed functions associated with rulemaking processes. Among other things, this guidance might provide specific examples of rulemaking-related functions that qualify as inherently governmental functions and should not be contracted out or that are closely associated with inherently governmental functions such that agencies should exercise heightened caution when contracting out those functions.

Administrative Conference Recommendation 2022-2

Improving Notice of Regulatory Changes

Adopted June 16, 2022

Each year federal agencies issue hundreds of thousands of pages of legislative rules, guidance documents, adjudicative orders, notices, and other materials that affect administrative programs. Although the law generally requires these materials to be made publicly available,¹ individuals and organizations often lack the resources or expertise to track and understand regulatory changes that might affect them. This is particularly true for small entities and members of communities that have been historically underserved by government programs.² Without effective notice of regulatory changes, interested persons may miss out on benefits to which the law entitles them or find themselves subject to enforcement actions for noncompliance with legal requirements of which they were unaware, and other potentially interested persons may be unaware of regulatory changes that affect them. A lack of effective notice may also make

¹ See, e.g., 5 U.S.C. § 552(a); 44 U.S.C. § 1505.

² Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

it less likely that regulated parties will come into compliance with their legal obligations without the need for an agency to undertake an enforcement action.³

Although agencies must comply with legal requirements for notice, agencies can take a variety of steps to improve notice of regulatory changes. This is of particular importance when a change is significant, meaning that it could reasonably be expected to change the behavior of regulated parties or regulatory beneficiaries.⁴ An agency might consider strategies such as publishing information about the change on its website, issuing a press release or fact sheet summarizing and explaining the change, communicating the change using social media or email lists, holding a public meeting to explain and answer questions about the change, and creating and updating agency reference guides. Agencies should also consider designing their websites to organize and present information in a way that makes significant regulatory changes clear and obvious to users and allows them to identify particular topics on which they wish to receive email alerts.

An agency's strategy for notifying potentially interested persons of a particular regulatory change will depend, in large part, on the agency's objectives; the nature, purpose, and significance of the regulatory change; and the characteristics of the persons who would potentially be interested in the change. This Recommendation provides a framework for developing effective notice strategies and for evaluating their effectiveness for future improvement.⁵

³ See Joshua Galperin & E. Donald Elliott, Providing Effective Notice of Regulatory Changes (May 17, 2022) (report to the Admin. Conf. of the U.S.).

⁴ Reference to "significant" regulatory changes in this Recommendation does not refer to "significant" or "major" rules as those terms are used in Executive Order 12,866 and the Congressional Review Act.

⁵ The Administrative Conference in recent years has issued several recommendations on providing public access to legal materials related to administrative programs, including agency guidance documents, adjudicative rules, and adjudicative decisions. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017). This Recommendation

This Recommendation acknowledges differences across agencies in terms of the number and kinds of significant regulatory changes they make, their resources and capacities for providing notice, and the resources and capacities of potentially interested persons for following regulatory changes. Appropriate notice strategies will therefore differ among agencies.

Accordingly, although it is likely that agencies following this Recommendation will employ some of the strategies enumerated, this Recommendation should not be understood as necessarily advising agencies to employ every strategy for every significant regulatory change.

RECOMMENDATION

Developing and Reviewing Notice Plans

1. Agencies should develop written notice plans, as appropriate, for providing effective notice of significant regulatory changes. A significant regulatory change is any change in law or policy, however announced, that can reasonably be expected to alter the behavior of potentially interested persons. Notice plans should:
 - a. Identify persons who may be interested in the agency's significant regulatory changes;
 - b. Specify strategies the agency proposes to use to provide notice;
 - c. Assess the expected costs and benefits of each strategy; and
 - d. Establish processes and metrics for evaluating the effectiveness of each strategy.
2. In developing their notice plans, agencies should consider the categories of persons who may be interested in the agency's significant regulatory changes and the optimal approach to tailoring notice to each of the different categories of persons.
3. In developing their notice plans, agencies should consider the variety of legal materials, including legislative rules, guidance documents, and adjudicative decisions, through

expands on those recommendations by specifically addressing strategies for improving public notice of significant regulatory changes that agencies make through such materials.

which significant regulatory changes are made and the optimal approach to tailoring notice based upon the nature of each change and the categories of persons it affects.

4. In developing their notice plans, agencies should obtain feedback from potentially interested persons as to which methods for providing notice they consider most effective.
5. Agencies should consider whether individual significant regulatory changes might warrant additional strategies not included in the agency's notice plan, either because they affect persons not previously regulated or new regulatory beneficiaries, or because the potentially interested persons have specific needs for effective notice.
6. Agencies should periodically evaluate which strategies are most effective at notifying potentially interested persons, including historically underserved communities, of significant regulatory changes. In doing so, agencies should obtain feedback from potentially interested persons regarding which methods for providing notice they consider most effective and suggestions for improvement.

Strategies for Providing Effective Notice

7. Although no single technique will work for all agencies or in all circumstances, in assessing the strategies they wish to undertake both as a general matter and with regard to specific significant regulatory changes, agencies should consider whether such strategies:
 - a. Are cost-effective;
 - b. Are likely to increase compliance with legal obligations and reduce the need for enforcement;
 - c. Are targeted to reach members of historically underserved communities and potentially interested persons who may have less capacity to monitor changes;
 - d. Reduce the administrative burden for regulated persons to assemble changes that emerge from a combination of agency materials;
 - e. Have proved effective when used by other agencies to provide notice; and

- f. Provide opportunities for interested persons to identify areas about which they would like to receive notice of significant regulatory changes.
8. Agencies should consider publishing in the *Federal Register* regulatory changes for which they anticipate the most widespread public interest, even when not required by law to do so.
9. When agencies publish guidance documents announcing significant regulatory changes on their websites, they should consider publishing notices in the *Federal Register* alerting potentially interested persons that the documents are available.
10. Agencies should seek to organize and present material on their websites in a way that makes significant regulatory changes clear and obvious to potentially interested persons and provides clear instructions to users regarding how to access materials announcing significant regulatory changes.
11. Agencies should consider optimizing their websites to improve the visibility of significant regulatory changes in commercial search engines.
12. Agencies should consider publishing summaries of legal materials organized by topic.

This approach is particularly useful in providing notice when regulatory changes emerge from different agencies or when agencies announce policy through adjudications or guidance documents, because it can be difficult for potentially interested persons to synthesize the changes. Agencies that publish such summaries should revise those summaries promptly to reflect significant regulatory changes. Agencies must, however, balance the benefits of providing such summaries of the law against the costs in terms of staff time and potential oversimplification of the applicable law.
13. Agencies should consider issuing press releases when they make significant regulatory changes. This approach is particularly useful in alerting both potentially interested persons who may be subject to new or expanded regulatory requirements that have not

previously affected them and potentially interested persons who may have less capacity to monitor changes.

14. Agencies should consider developing and using email distribution lists to inform potentially interested persons about significant regulatory changes. Email distribution lists are an effective way to provide notice to targeted groups of discrete and defined potentially interested persons, such as specific community or advocacy groups, at low cost. Agencies should, however, bear in mind the following limitations of email distribution lists:
 - a. Email distribution lists are less effective in providing notice to large groups of individuals or those not previously affected by regulatory requirements;
 - b. Potentially interested persons must know that lists exist and affirmatively sign up for them; and
 - c. Overuse of email distribution lists could result in a significant regulatory change being obscured by less relevant messages. Agencies can mitigate this risk by allowing users to opt in to receiving notice on narrowly defined topics.
15. Agencies should consider using available technologies such as web forms to allow interested persons to identify particular topics on which they wish to receive notice.
16. Agencies should consider using social media, which is inexpensive and far-reaching, to publicize significant regulatory changes.
17. Agencies should consider using blogs on their websites to inform potentially interested persons about significant regulatory changes. Blogs allow agencies to tailor notice to the interests and needs of particular groups and provide notice in ways that are accessible to those groups.
18. Agencies should consider hosting public meetings or participating in conferences or other meetings convened by outside organizations to share information and answer questions

about significant regulatory changes. Agencies must, however, balance the advantages of such meetings against the cost in terms of staff time and administration.

19. When agencies host public meetings to share information about significant regulatory changes, they should generally provide a means for potentially interested persons to attend or participate remotely. By so doing, they can expand access for members of historically underserved communities, potentially interested persons who live far from where the agency holds meetings, and potentially interested persons who face other accessibility issues.
20. Agencies should consider training and equipping front-line agency employees, including those in field offices, to answer questions about significant regulatory changes.
21. Agencies should consider identifying and working with state and local governments and intermediary organizations (e.g., trade associations, professional associations, community organizations, and advocacy groups) that can assist in providing effective notice to potentially interested persons.

Oversight and Assessment

22. Agencies should consider designating an officer or office to coordinate and support the development, implementation, and evaluation of notice plans. This officer or office should:
 - a. Be responsible for evaluating the effectiveness of the agency's notice plan;
 - b. Keep abreast of technological developments for improving notice strategies, such as new social media platforms or improved methods for indexing and organizing documents on the agency's website;
 - c. Evaluate practices that other agencies use to provide notice of significant regulatory changes; and

- d. Make recommendations for improving the agency’s practices and procedures for providing effective notice of significant regulatory changes to potentially interested persons.
23. Agencies should share information with each other about their experiences with and practices for improving notice of significant regulatory changes.

Administrative Conference Recommendation 2022-3

Automated Legal Guidance at Federal Agencies

Adopted June 16, 2022

Federal agencies increasingly automate the provision of legal guidance to the public through online tools and other technologies.¹ The Internal Revenue Service, for example, encourages taxpayers to seek answers to questions regarding various tax credits and deductions through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration Services suggests that potential green card holders and citizens with questions about their immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal agencies have either implemented or piloted such automated legal guidance tools in just the past three years.²

Automated legal guidance tools can take several forms. The most common are chatbots and virtual assistants. The simplest chatbots provide standardized responses based on keywords included in a user’s question. Although the terms can overlap, virtual assistants tend to be more versatile than chatbots and can often perform additional tasks such as making an appointment or filling out a form in response to a conversation.³ More robust tools rely on natural language

¹ This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials that agencies consider to be guidance documents. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

² They include the Department of the Army, the Department of Education, the Environmental Protection Agency, the General Services Administration, the Food and Drug Administration, the Internal Revenue Service, the National Institutes of Health, the Patent and Trademark Office, the Social Security Administration, United States Citizenship and Immigration Services, and the Veterans Benefits Administration.

³ *See* Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance at Federal Agencies* 1, 10 (May 26, 2022) (report to the Admin. Conf. of the U.S.).

processing or artificial intelligence to interpret natural language and generate an individualized response.⁴

Agencies use automated legal guidance tools for a number of reasons. They include: efficiently allocating limited staff resources; improving user experience and service delivery; and enhancing the quality, consistency, and predictability of guidance, as well as the speed with which it is provided to the public. Because they are always available from any location and can efficiently and effectively provide answers to common questions, automated legal guidance tools have the potential to revolutionize the provision of agency guidance to the public.

Agencies generally take the position that users cannot rely on automated legal guidance. As this Recommendation recognizes, agencies must be clear in disclosing this position to users. That is true, of course, of all forms of guidance documents.⁵ Automated legal guidance may, however, create an especially heightened risk of a user's relying on the guidance issued in a way that the issuing agency does not intend. Since users often enter specific facts relating to their circumstances, users may assume that the automated guidance tool is giving a customized response that has accounted for all of the facts that have been entered, which may or may not be the case.

The Administrative Conference has adopted several recommendations on the development, use, and public availability of agency guidance documents.⁶ This Recommendation builds on those recommendations by identifying best practices for agencies to consider when

⁴ See Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 3.

⁵ See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 11–12, 84 Fed. Reg. 38,931, 38,933 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, ¶¶ 6, 11, 84 Fed. Reg. 38,927, 38,929 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶¶ 4–6, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

⁶ See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).

they develop, use, and manage automated legal guidance tools. In identifying these best practices, the Conference recognizes that automated legal guidance tools may not be suitable for all agencies and administrative programs and that even when agencies use them, agencies will need to provide additional guidance by other means, including live person-to-person support.

RECOMMENDATION

Design and Management

1. Agencies should explore the possible benefits of offering automated legal guidance tools, including enhancing administrative efficiency and helping the public understand complex laws using plain language. This is especially true for those agencies that have a high volume of individual interactions with members of the public who may not be familiar with legal requirements.
2. Agencies should also weigh the potential downsides of offering automated legal guidance tools, including potentially oversimplifying the law and creating confusion as to whether and when the agency intends users to rely on the guidance issued. To avoid such confusion, agencies should follow the recommendations set forth in Paragraphs 18–20.
3. Agencies using automated legal guidance tools should design and manage them in ways that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.
4. Agencies should ensure that automated legal guidance tools do not displace other agency mechanisms for increasing access to the underlying law.
5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the content embedded in automated legal guidance tools and should publish these procedures on their websites. These procedures should incorporate periodic user testing and other forms of evaluation by internal and external researchers to ensure accessibility and effectiveness.

6. The General Services Administration should regularly evaluate the relative costs and benefits of using outside vendors for the production of automated legal guidance tools and share their evaluations with agencies.

Accessibility

7. Agencies should utilize human-centered design methodologies, empirical customer research, and user testing, as described and defined in Executive Order 14,058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government* (86 Fed. Reg. 71,357 (Dec. 13, 2021)), in designing and maintaining their automated legal guidance tools.
8. Agencies should, consistent with applicable laws and policies, design and periodically review and, when necessary, reconfigure automated legal guidance tools to ensure that they meet the needs of the particular populations that are intended to utilize the automated legal guidance tools.
9. Agencies should ensure that information provided by automated legal guidance tools is stated in plain language understandable by the particular populations that are intended to use these tools, consistent with the Plain Writing Act of 2010 (5 U.S.C. § 301 note); Recommendation 2017-3, *Plain Language in Regulatory Drafting* (82 Fed. Reg. 61,728 (Dec. 14, 2017)); and other applicable laws, policies, and Conference recommendations.
10. Agencies should design automated legal guidance tools to put users in contact with a human customer service representative to whom they can address questions in the event that a question is not answered by an automated legal guidance tool or if the users are having difficulty using the tools.

Transparency

11. When the underlying law is unclear or unsettled, or when the application of the law is especially fact-dependent, agencies should be transparent about the limitations of the advice the user is receiving. To the extent practicable, agencies should also provide

access through automated legal guidance tools to the legal materials underlying the tools, including relevant statutes, rules, and judicial or adjudicative decisions.

12. Agencies should disclose how they store and use the data obtained through automated legal guidance tools.
13. Agencies should update the content of automated legal guidance tools to reflect legal developments or correct errors in a timely manner. Agencies should also maintain an electronic, publicly accessible, searchable archive that identifies and explains the updates. Agencies should provide the date on which the tool was last updated.
14. When automated legal guidance tools provide programmed responses to users' questions, agencies should publish the questions and responses so as to provide an immediate and comprehensive source of information regarding the tools. Agencies should post this information in an appropriate location on their websites and make it accessible through the automated legal guidance tool to which it pertains.
15. When automated legal guidance tools learn to provide different answers to users' questions over time, agencies should publish information related to how the machine learning process was developed and how it is maintained and updated. Agencies should post this information in an appropriate location on their websites and make it accessible through the automated legal guidance tool to which it pertains.
16. Agencies that use automated legal guidance tools should provide users the ability to offer feedback or report errors.
17. When applicable, agencies should provide disclaimers that the automated legal guidance tool is not human.

Reliance

18. Agencies should allow users to obtain a written record of their communication with automated legal guidance tools and should include date and time stamps on the written record.

19. Agencies should consider whether, or under what circumstances, a person's good faith reliance on guidance provided by an automated legal guidance tool should serve as a defense against a penalty or other consequences for noncompliance with an applicable legal requirement, and they should prominently announce that position to users.
20. If an agency takes the position that it can depart from an interpretation or explanation provided by an automated legal guidance tool, including in the application of penalties for noncompliance, it should prominently announce its position to users, including in the written record of the communication with the automated legal guidance tool.